

**Millwrights and Machinery Erectors Local Union  
No. 2834 and Calvin L. Fleck and Atlantic  
Plant Maintenance, Inc., Party to the Contract.  
Case 27-CB-1702**

26 October 1983

### DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER

On 28 March 1983 Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified herein.<sup>2</sup>

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Millwrights and Machinery Erectors, Local Union No. 2834, Denver, Colorado, its officers, agents, and representatives, shall take the action set forth in the order as modified.

1. Insert the following as paragraph 2(c) and re-letter the subsequent paragraphs.

"(c) Expunge from its files any reference to the failure and refusal to dispatch Calvin Fleck to the Fort St. Vrain nuclear power plant and notify him, in writing, that this has been done and that evidence of Respondent's failure and refusal to dispatch him shall not be used as a basis for future action against him."

2. Substitute the attached notice for that of the administrative law judge.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We have modified the judge's recommended Order to include the expunction remedy recently approved by the Board in *Boilermakers (Daniel Construction)*, 266 NLRB 602 (1983).

### APPENDIX

NOTICE TO MEMBERS  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coerce or restrain employees, members, job applicants, or registrants by failing and refusing to dispatch them in violation of the rules and procedures of our exclusive hiring hall and referral system.

WE WILL NOT operate our exclusive hiring hall and referral system in an arbitrary manner and fail to timely and fully inform all users of changes in the operating procedures and rules of said hiring hall and referral system.

WE WILL NOT in any like or related manner restrain or coerce employees, members, job applicants, or registrants in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reimburse Calvin Fleck for any wages and benefits he may have lost as a result of our failure to dispatch him, with interest.

WE WILL expunge from our files any reference to our failure and refusal to dispatch Calvin Fleck to the Fort St. Vrain nuclear power plant and notify him, in writing, that this has been done and that evidence of our failure and refusal to dispatch him shall not be used as a basis for future action against him.

MILLWRIGHTS AND MACHINERY ERECTORS,  
LOCAL UNION NO. 2834

### DECISION

#### STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge: This matter came to trial before me on November 30, 1982, in Denver, Colorado. On May 7, 1982, the Regional Director for Region 27 of the National Labor Relations Board issued a complaint and notice of hearing, based on an unfair labor practice charge filed by Calvin L. Fleck, an individual, on January 4, 1982, alleging that Millwrights and Machinery Erectors, Local Union No. 2834, herein called Respondent, engaged in conduct violative of Section 8(b)(1)(A) of the National Labor Relations Act. Respondent filed an answer denying the commission of any unfair labor practices. At the trial all parties were afforded the opportunity to examine and cross-examine witnesses, offer into evidence all relevant evidence, to argue their positions orally, and to file posthearing briefs, which were subsequently filed and carefully considered. Accordingly, based on the record as a whole, including

my observation of the demeanor of the witnesses and the posthearing briefs, I issue the following

### FINDINGS OF FACT

#### I. JURISDICTION

The record establishes that Atlantic Plant Maintenance, Inc., herein called APM, a wholly owned subsidiary of General Electric, is a State of Illinois corporation and engaged, in part, in the business of inspecting and repairing turbines at power plants located in the States of Colorado and Wyoming. Respondent admits that in the course and conduct of its entire business operations APM annually sells and ships goods and materials valued in excess of \$50,000 directly to customers and places outside the State of Illinois and that APM is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. LABOR ORGANIZATION

Respondent admits that it is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

#### III. ISSUES

1. On or about November 12, 1981,<sup>1</sup> did Respondent refuse a byname call for Calvin L. Fleck to work for APM at the Fort St. Vrain nuclear power plant which is located near Platteville, Colorado?

2. On or about November 12 did Respondent fail and refuse to dispatch Calvin L. Fleck to work for APM at the aforementioned Fort St. Vrain project in violation of Section 8(b)(1)(A) of the Act?

#### IV. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *The Facts*

The record discloses that Respondent, which represents journeymen and apprentice millwrights, has a territorial jurisdiction covering the States of Colorado and Wyoming; that, at all times material herein, Theodore C. Sanford has been the business manager/financial secretary of Respondent and in overall charge of its operations; and that, from October 1980 through November 1981, Jacob Goldade<sup>2</sup> was one of three assistant business representatives for the labor organization.<sup>3</sup> The record further discloses that APM operates nationwide, furnishing people for maintenance work at utility power plants and related facilities, and that APM has extensive operations in Wyoming and Colorado. Respondent's parent organization, the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is the collective-bargaining representative for all of APM's carpenter/millwright

employees within said union's territorial jurisdiction, and the Carpenters Union and APM are parties to a National Power Generation Maintenance Agreement which became effective on September 15, 1978, and which established nationwide terms and conditions of employment. The record also discloses that Respondent refers workers to APM, for the latter's operations within Colorado and Wyoming, from an exclusive hiring hall which was established pursuant to said collective-bargaining agreement. More specifically, article XIX of the nationwide Carpenters Union contract, General Counsel's Exhibit 2, states that "the Employer agrees to hire men in any territory where work is being performed or is to be performed in accordance with the hiring procedure existing in the territory . . . however, in the event the Local Union is unable to fill the request of the Employer . . . within a forty-eight (48) hour period . . . the Employer may employ workmen from any source," and article 8 of Respondent's areawide collective-bargaining agreement, effective from May 1, 1981, until April 30, 1984, with contractors located in the States of Colorado and Wyoming, sets forth the local rules and procedures for the hiring and dispatch of workers to APM by Respondent.<sup>4</sup> Said provision reads, *inter alia*, as follows:

### ARTICLE 8

#### HIRING HALL PROCEDURES

Section 1. The Union shall establish and maintain an open and non-discriminatory employment list for employment of (UNEMPLOYED) workmen of this particular trade, including journeyman Millwrights and indentured apprentices previously employed by Employers in the area under jurisdiction of the Union and non-member workers who may make application for a place on the list.

Section 2. All individuals desiring employment shall register at the Union Office, Denver, Colorado, by appearing personally and shall indicate name, address, telephone number and social security account number, qualifications and type of work desired. In order to maintain his position on the out-of-work list, each individual must preregister the first Monday of each month, either by mail or in person.

Section 3. (a) Whenever desiring to employ workmen, the Employer shall call upon the Union or its representative for any such workmen as they may from time to time need, and the Union or its representative shall immediately furnish the Employer the required number of qualified and competent Millwrights needed by the Employer. Selection of applicants for referral shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, Union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect to obligation or Union membership, policies or requirements.

<sup>1</sup> Unless otherwise stated, all events herein occurred in 1981.

<sup>2</sup> Respondent admits that, at all material times herein, Sanford and Goldade acted as its agents within the meaning of the Act.

<sup>3</sup> According to Goldade, he spent the great part of his working time visiting jobsites in Wyoming and northern Colorado and that he rarely was involved in the dispatching of workers. The latter operation was primarily the responsibility of Sanford, with the assistant business representative acting in his absence.

<sup>4</sup> Counsel for Respondent represented at the trial that whenever in conflict, the terms of the nationwide agreement govern. No evidence was offered to contradict this statement.

(b) The Union may adopt and implement reasonable and non-discriminatory tests or other competency criteria to ensure that individuals referred under this Article possess the qualifications of competent, journeymen Millwrights.

Section 4. The Union or its representatives will furnish such required competent Millwrights, entered on said list, to the Employer by use of a written referral, which shall be furnished to the Millwrights dispatched either personally, by mail (or any other convenient method), and will furnish such Millwrights from the Union's open listing in the manner and order following:

(a) The specifically named Millwrights who have been laid off or terminated by the Employer now desiring to reemploy the same Millwrights, provided they are available, within forty-eight (48) month period after such layoff or termination.

(b) Millwrights who have been employed in the jurisdiction of the Union in the majority of each of the preceding four (4) calendar years: provided, however, that if an individual was domiciled within the Union jurisdiction during one or more such calendar years experienced illness or other disability, he shall be deemed to have been employed during the term of such illness or disability for the purposes of this subparagraph.

(c) All (other) Millwrights whose names are entered on the list above referred to and who are available for employment.

Section 5. Reasonable advance notice (but no less than twenty-four (24) hours) will be given by the Employer to the Union or its representative upon ordering Millwrights; and in the event that within seventy-two (72) hours after such notice, the Union or its representative shall not furnish such Millwrights, the Employer may procure Millwrights from any other source or sources. If Millwrights are so employed, the Employer shall within forty-eight (48) hours report to the Union or its representative such Millwrights by name and social security number and date of hire.

Section 6. (a) Available for employment means that the individual (IS UNEMPLOYED AND) shall be currently registered and either shall be present at the Union office or at a location where he can be reached by telephone.

(b) Registrants, other than those in Colorado or Wyoming, who must be telephoned by long distance shall be called (collect).

(c) Individuals may, if they so desire, specify particular geographical areas or location in writing at the beginning of every quarter, stating only where they will accept employment.

Individuals so specifying particular areas or locations will not be considered or contacted for employment in other areas or locations until such time as all registrants in such specified areas or locations have been offered employment. Registrants cannot change such area or location specification except at the beginning of each quarter.

(d) Registrants, other than those specifically requested pursuant to section 4(a), shall be called in order of registration by priority grouping. In administering this subsection, the Union shall commence the referral process each day with the priority grouping in Section 4(b) and attempt to fill positions with the highest ranked registrant within such category and will continue to fill that or other positions with the next highest registrants in descending order. No individual shall be entitled to a second call during any day until all registrants ranked below him have been called once and all registrants ranked above him have been called twice; provided, however, that if a registrant, who because of his rank, if called, would be entitled to a position, contact the hiring hall, in person or by telephone, and indicates his willingness to accept a position then available, such registrant shall be offered the position.

Section 7. (a) To ensure the maintenance of the registration list, all individuals should register as soon as possible after termination of their present employment.

(b) All individuals desiring to be placed on the registration list for the first time shall be required to register in person, but may, thereafter, reregister by mail as provided below.

Section 8. Individuals shall be removed from the registration list for the following reasons:

(a) Dispatched to a job except that any individual who is rejected by the Employer or fails to complete five (5) full days and/or forty (40) hours, whichever occurs first, shall retain his position on said list.

(b) Failing to accept employment three (3) times within thirty (30) days after registering.

(c) Any individual dispatched to a job who fails to report to work.

(d) Failing to reregister for a particular calendar month on or before the first Monday of such calendar month; provided, however, that individuals shall be deemed to have reregistered on the first Monday of a calendar month if a written request for such reregistration has been forwarded to the Union and postmarked on or before the first Monday of such calendar month.

(e) Millwrights who cause themselves to be terminated to circumvent the foregoing procedures.

Notwithstanding that the above-quoted contract provisions make no distinction between dispatching millwrights by name pursuant to an employer request for specific individuals or by ranking on the out-of-work list after an employer makes an "open call" for qualified workers or that either method, in the words of Business Manager Sanford, "was legal," both Theodore Sanford and Jacob Goldade testified with regard to APM's alleged "abuse" of the byname dispatching procedure, which conduct commenced in the spring of 1981. According to Sanford, at approximately that time, APM began "quite a few turbine generator overhauls in Colorado and Wyoming," and consistently, for its employee

complement on each project, selected, by name, the identical 20 to 25 millwrights. In turn, these millwrights seemed to be cooperating with the company by "quitting their jobs, coming down, signing the out-of-work list, making themselves available for a job that would happen in a week or two away, which was not fair to the 500 millwrights that I represent."<sup>5</sup> Concluding that the situation "was getting to be just a big game," Sanford and Goldade held a series of meetings with APM officials at various Denver area restaurants in August during which the matter was discussed at length. Sanford testified, "I proceeded to discuss with the [APM] representatives there the problems that were starting to arise and trying to alleviate any future problems by the manipulation and/or abuse of the name call provisions. . . . I also brought out to the employer's attention. . . . that some of these [constantly called-for members] were starting to abuse their rights, or not necessarily abuse their rights, but abuse the employer by figuring that they were the chosen few. . . ."<sup>6</sup> While neither Sanford nor Goldade asserted that the APM representatives admitted that the company was abusing the hiring hall procedures,<sup>7</sup> the record reveals that some solutions were discussed. Thus, while not agreeing to relinquish its contractual rights, APM officials apparently indicated their willingness to limit byname requests to the millwright foreman on future projects. While Sanford denied any agreement on this point, Goldade testified that APM officials were adamant about, at least, continuing this limited practice and that it "was kind of left open that we would discuss it when the time came."<sup>8</sup>

<sup>5</sup> Apparently compounding the problem perceived by Sanford at that time was the fact that Respondent's membership commenced a 2-month strike on May 1. Although unclear, it does not appear that APM was a struck employer.

<sup>6</sup> One of Respondent's members who regularly worked for APM during 1981 was Charging Party Calvin L. Fleck. The record establishes that Fleck, who is a journeyman millwright and who has been a member of Respondent since 1974, worked on power plant projects for APM in the spring of 1981 as a general foreman at Craig, Colorado; in June, July, and August as a night foreman at Glenrock, Wyoming; and in September and October as a millwright at Wheatland, Wyoming. Fleck did not, however, work exclusively during the year for APM, also working for Millwrights Services Company and Rocky Mountain Millwrights.

Fleck testified as to an incident, involving Goldade, immediately after the contract ratification membership meeting in July. Angered over the new rates of pay for foremen and general foremen, Fleck, with other members listening, confronted Goldade, and "I opposed the contract. And he asked what I thought of the contract, and I told him that I thought it was written for the business agents." Goldade replied "that the hall was sick and tired of APM calling and asking for people by name, and he said that I would not be dispatched to Wheatland." Fleck responded "that if [he] was called to work by name at Wheatland and the hall did not call [him], either the hall would pay . . . or [APM] would pay [him]."

Eventually, Fleck did work on APM's Wheatland project; however, the record is unclear as to the circumstances of his dispatch.

<sup>7</sup> Both conceded that, contractually, APM was permitted to call its prospective employees by name, provided that said individuals were eligible for such.

<sup>8</sup> By the time of these meetings with the APM representatives, job prospects for Respondent's representatives were considerably better than in May. Thus, according to Sanford, at the conclusion of the strike "we were having one heck of a hard time filling any job . . . and work blossomed and we went crazy there for about six months." Further, in November, Sanford admitted, a registrant's dispatch chances were "real good."

The record establishes that APM received a contract to disassemble and inspect the turbine at the Fort St. Vrain nuclear power plant in Platteville, Colorado, which is located 47 miles from Denver; that the project was scheduled to commence on November 16 and to last for 8 weeks, on a single-shift 40-hour workweek basis; and that Fred Powell<sup>9</sup> was APM's project manager and responsible for the entire operation, including the hiring of workers. Powell testified that APM employed millwrights and pipefitters on the job and that, as the millwright crew foreman, he wanted Calvin Fleck.<sup>10</sup> As to hiring the latter, Powell believed that he had the right, pursuant to a "gentlemen's agreement" between APM and Respondent, to call for Fleck by name from Respondent's hiring hall— "It's more or less standard practice that we have the right to call for a foreman. Sometimes we don't go that route, but if we have somebody in mind that has worked for APM before, then we do call for them."<sup>11</sup>

According to Powell, approximately 2 weeks before the Fort St. Vrain job was to start, he visited Respondent's office in Denver in order to speak to Theodore Sanford and discuss APM's manpower needs on the project. "I came in and we sat down and just chewed the fat for a little bit about how things were going . . . and I told Ted that I was going to be the job manager at Fort St. Vrain, that we had a job coming up in a couple of weeks." Sanford replied that his people needed the work, and Powell explained that the job would "be running for approximately eight weeks, forty hours . . ." and that "I wasn't going to call for the whole crew by name. I was only going to call just for the foreman." Thereupon, Powell asked if Sanford had any good people on the out-of-work list and said he would need a good foreman. "I'd kind of like to have Fleck up there if

<sup>9</sup> Powell, who is a member of Respondent, has been employed by General Electric as a field representative for 3 years. Prior to the Fort St. Vrain job, he served in a management capacity for APM on two other projects in Wyoming.

<sup>10</sup> Powell testified that Mike Barecone, the project manager on APM's Wheatland, Wyoming job, recommended that he hire Fleck as the millwright crew foreman. Powell estimated that this was approximately 1 month before the Fort St. Vrain project was scheduled to commence, and he did not know if Fleck was even registered on the out-of-work list. Further, according to Powell, while not the extent of it, he did know that Fleck had been injured while working at Wheatland and had a cast on one hand.

With regard to the latter matter, Fleck testified that while working at Wheatland on October 10, another employee accidentally dropped a hydrogen seal on his left hand resulting in two hairline fractures. A doctor placed a cast on his hand and told him not to work for at least a month, and Fleck was terminated from the project. Fleck further testified that he returned to his home in Story, Wyoming, and that approximately 3 weeks later he removed the cast as gasoline had been spilled on it. "My wife called the doctor and he asked if I was having any problem with it. She told him no, and he set up an appointment . . . to see him." Although originally arranged for early November, at the doctor's request the appointment was rescheduled for November 16.

<sup>11</sup> Powell testified that he was aware of the August meetings between representatives of both APM and Respondent but not the results of same. He further testified that his knowledge of the "gentlemen's agreement" was based on "common practice," stating that he was able to call for the millwright foreman by name for the Jim Bridger project in Wyoming earlier that year. Also, Powell acknowledged that the foregoing applied only to a millwright foreman and that journeyman millwrights would be dispatched by Respondent pursuant to an open call.

it's possible.' And Ted said, 'Well, you've got a couple weeks yet before the job goes. Let's just play it by ear. . . .'" Powell could not recall if Sanford referred to Fleck's hand injury but admitted in his pretrial affidavit that Sanford told him "that at the time of my call for men he would see if Fleck were available." Sanford's recollection of this conversation is consistent with the foregoing account. According to him, Powell "dropped in," and they discussed the Fort St. Vrain project. "[Powell] said it had been brought to his attention that [Fleck] was a pretty good foreman . . . and that, if possible, he would like to have him." Sanford, who knew that Fleck had been injured in Wheatland,<sup>12</sup> testified that he responded by mentioning Fleck's hand injury and saying, "Well, when you get everything sorted out, we'll talk about it. You give us an order and we'll discuss it." Sanford admitted that he said nothing about this conversation to anyone on Respondent's staff.

On November 11, 5 days before the Fort St. Vrain job was scheduled to begin, Powell sought to formally request workers from Respondent's hiring hall, speaking to the secretary, Kathy Rendon. Powell testified that he asked to speak to a business agent and that Rendon said none was in the office. "And I said, 'Well . . . I need three men for Fort St. Vrain.' And I told her the day for them to arrive; also said that I'd like to have Mr. Chip Fleck as foreman and that Ted and I had talked about it previously . . . ."<sup>13</sup> He continued that Rendon responded, ". . . 'Well, I don't know if brother Chip will want to come down for just 40 hours.' She said, 'That's a long ways down from Wyoming and no sub.'"<sup>14</sup> Rendon corroborated Powell that the latter requested Calvin Fleck, by name, and other, unspecified journeyman millwrights for the Fort St. Vrain job in Platterville; that, as she was aware Fleck lived in Wyoming, she did not know whether he would be willing to come from Wyoming for a 40-hour-a-week-and-no-overtime job; and that she told Powell that he could speak to a business agent the next morning.

There is no dispute that Powell spoke to Jacob Goldade the next morning with regard to Fleck and the foreman position at Fort St. Vrain. Goldade, who admitted having no knowledge of Fleck's hand injury, asserted that prior to the telephone conversation he had no

knowledge that Powell was interested in Fleck for the foreman position. Contradicting Goldade, Kathy Rendon testified that, on concluding her conversation with Powell, she drafted two messages, one specifying Powell's work order and the other for one of the assistant business representatives, stating that Powell had placed a work order for, among others, Calvin Fleck—by name. The latter message, she testified, she eventually gave to Goldade. Goldade, on the other hand, testified that "the message that Kathy gave me was just on a piece of paper. She said, 'Freddie called for some people. I couldn't help him. He's going to call back in the morning and talk to one of the agents when they come in.' There was actually no name call on it." In any event, both Rendon and Goldade testified that on November 12 Powell telephoned to Respondent's office and that Goldade thereupon spoke to him.<sup>15</sup>

With regard to the content of their conversation, Powell testified that Goldade began, stating that he did not think Fleck would be available for the Fort St. Vrain job but that if Fleck would have been available, Powell could have Fleck as foreman.<sup>16</sup> Powell did not ask Goldade to elaborate, and the latter continued, saying he had other men who were available and who would make good foremen and named three others, including Royal Whitney. The two other men were unacceptable to Powell; however, having had prior experience with Whitney, Powell said, ". . . 'Well, we'll give him a try. If he doesn't work out, we'll have to change him.' . . . and Mr. Goldade said, 'No problem.'" During cross-examination, Powell specifically denied having requested the referral of Whitney or discussing with Goldade the placement of Whitney on Respondent's out-of-work list. Goldade's account of their conversation, although more detailed, is basically corroborative of Powell's version. The former testified that he began by greeting Powell and that the latter said he needed three people, "and I'd like to have Chip Fleck as my foreman." Goldade asked how "hung up" Powell was on Fleck; Powell replied by saying Fleck had been recommended and asking why. Goldade replied, "Well, the only thing, my concern is he's quite a ways down on the list, and we've got . . . good people right on top of the list." Goldade continued, saying he did not think Fleck would accept the job in any event. After Powell asked how Goldade knew that, the latter admitted he did not know that but said, "The only thing I can go by is [Fleck] lives clear up in Wyoming. You're talking about a 40-hour job, no sub, and just about a week ago or two weeks ago I called him for a job that was running time in Wyoming and he turned it down. So really, I don't think he'd even take it."<sup>17</sup>

<sup>12</sup> Sanford testified that Respondent's job steward telephoned and reported that Fleck received a wrist injury in October.

<sup>13</sup> The parties stipulated that, pursuant to his written request dated October 28, Fleck was placed on Respondent's out-of-work list on November 1. Further, there is no dispute that he was properly on said list during the period November 10 through November 14, that he was not at the top of the list, or that he was qualified for a byname call by APM. Finally, Fleck requested inclusion on the out-of-work list notwithstanding his hand injury, testifying it was common practice for members to do so. Sanford corroborated Fleck in this regard.

<sup>14</sup> By use of the word "sub," Rendon evidently referred to subsistence pay which, pursuant to the collective-bargaining agreement, is a form of per diem payment to workers for traveling beyond a certain distance from the hiring hall. In this case, as the specified distance was 50 miles, there was no subsistence pay on the Fort St. Vrain job. Based on what Rendon told him and on his knowledge that Fleck lived somewhere in Wyoming, Powell formed the conclusion that Fleck would not accept the Fort St. Vrain job. However, the latter testified that he would have accepted the job as it was near the Denver area, as his daughter lived in Denver and was expecting a baby at this time, and as his wife was with his daughter, awaiting the birth of the child.

<sup>15</sup> Powell initially testified that Goldade called him but later stated that he could not recall who placed the phone call.

<sup>16</sup> Goldade, according to Fleck, gave no reasons for what he said but, based upon his conversation with Rendon, Powell assumed Fleck did not want to travel from Wyoming for a mere 40-hour-per-week job with no subsistence payment.

<sup>17</sup> This last assertion engendered much testimony by Goldade. On examining Respondent's records, he concluded that the job was for Western Power, which had placed the job order on October 30. Goldade insisted that he telephoned Fleck shortly thereafter and that Fleck rejected the dispatch. However, after searching through Respondent's telephone

*Continued*

Thereupon, according to Goldade, he advised Powell that there were other men on the out-of-work list. After the latter asked who, Goldade mentioned Whitney and two others. Powell rejected the others, and Goldade said that Whitney was experienced and higher on the out-of-work list than Fleck. Goldade asked if Powell would consider using Whitney. "Fred said '... yes, but he said, I'll reserve one night, Jack. Say Royal doesn't work out, can I still get Chip Fleck.' And I said, 'Yes, no problem.'" Finally, Goldade insisted that he told Powell two or three times that he was not refusing to dispatch Fleck.

There can be no question that Goldade attempted to, and did, dissuade Powell from continuing to insist upon Fleck by name. Witness the following colloquy between Goldade and me:

JUDGE LITVACK: Why did you give all those reasons to Mr. Powell if for all you knew Mr. Fleck may have wanted the job? It seems like you were doing everything you could to dissuade Mr. Powell from calling Mr. Fleck by name.

THE WITNESS: The only reason for that—

JUDGE LITVACK: Is that a true statement?

THE WITNESS: This is a true statement.

Goldade insisted that what he did was not as a result of any personal animosity toward the Charging Party; rather, "my intent was to have Freddie Powell call somebody closer to the top of the out-of-work list." Ultimately, according to Goldade, the people who were dispatched to Fort St. Vrain were "right at the top" of the out-of-work list.<sup>18</sup>

Finally, Calvin Fleck testified that he spoke to no union officials during the period subsequent to his injury on the Wheatland, Wyoming job (October 10) until late November, in the week after Thanksgiving. Other than to transmit the alleged job offer in early November, Goldade did not speak to Fleck during this time period, and Sanford admitted that he did not speak to Fleck about the Fort St. Vrain job. As to his injury, Fleck was examined by his doctor on November 16 and was given a release to work the next day.

#### B. Analysis

The complaint alleges that, by refusing to refer Calvin Fleck to APM's job at the Fort St. Vrain nuclear power plant on or about November 12, Respondent engaged in conduct violative of Section 8(b)(1)(A) of the Act. In support, counsel for the General Counsel argues that APM was contractually privileged to request Fleck by name and did so, that Respondent misrepresented Fleck's availability and persuaded APM to accept another member without informing Fleck of the request for him, that the failure to dispatch Fleck was in conversation of

the explicit hiring hall provisions of the parties' collective-bargaining agreement, and that such establishes a violation of the Act without regard for Respondent's motivation, altruistic or otherwise. Taking a contrary position, Respondent's attorney contends that no violation of the Act has been committed herein inasmuch as there was no name call for Fleck, as no refusal to refer was possible due to Fleck's unavailability for dispatch resulting from his hand injury, as Respondent was under no duty to ascertain the extent of Fleck's injury, as there is no evidence of discriminatory motivation, and as Respondent had a legitimate purpose in refusing to dispatch Fleck to APM's job.

At the outset, it must be determined whether Respondent, through assistant business representative Goldade, in fact, refused a byname request for Calvin Fleck from Fred Powell of APM. In this regard, Respondent's attorney argues that there never was a name call for Fleck; rather, she asserts, Powell's stated desire for Fleck lasted only until he learned that other, qualified workers were higher than Fleck on the out-of-work list. I find no merit in this contention, believe such utterly misconstrues the evidence, and conclude that Respondent did, indeed, refuse to dispatch Fleck to APM. Initially, I note that the applicable exclusive hiring hall procedures clearly provide two equivalent methods by which workers were dispatched to jobs—pursuant to a request for a specified, albeit qualified, individual or pursuant to an "open call" whereby that worker at the head of the out-of-work list receives the job. There appears to be no contractual preference for one over the other method. Next, counsel concedes, and the record makes clear, that Powell stated his request that Calvin Fleck, by name, should be dispatched to the Fort St. Vrain job on three separate occasions—in an early November conversation with Business Manager Sanford, on November 11 when he gave his job order to office secretary Rendon, and on November 12 when he repeated his request to Goldade. While it is true that Powell was not certain as to Fleck's availability and that his conversation with Sanford may have been of a preliminary nature, I think that, in his conversations with Rendon and Goldade, Powell formally stated APM's request that Fleck be dispatched to be the Fort St. Vrain job foreman. There is nothing to indicate that Powell was merely expressing some sort of wish that Fleck could be dispatched, and, indeed, Rendon obviously understood Powell to be requesting Fleck, so informing Goldade in her note. Further, Goldade candidly admitted that, in response to Powell's request, his asserted reasons as to why Fleck would refuse the dispatch had no basis in known fact and were intended to dissuade Powell from continuing to insist on Fleck. To maintain, as does counsel, that Powell was receptive to the alternative millwrights mentioned by Goldade is utterly disingenuous and comparable to informing the traveler, who is anxious to reach a certain destination, that, as all others are inoperative, he must use a particular mode of transportation—owned by the speaker. Like the trusting traveler, Powell, who required a millwright foreman for the Fort St. Vrain job, had no reason to doubt the truth of Goldade's comments and had little choice but to

records, its attorney represented that no record of such a phone call existed. Fleck denied the incident.

As to whether the reasons, which he set forth for Powell as to why Fleck would not accept the Fort St. Vrain job, were ever stated to him by Fleck himself, Goldade admitted that he had no such conversation with Fleck.

<sup>18</sup> Notwithstanding the outstanding "problem" between APM and Respondent, Sanford admitted that such had been remedied by the time of the Fort St. Vrain job.

accede to his alternative suggestions. *Asbestos Workers Local 22 (Rosendahl, Inc.)*, 212 NLRB 913, 915 (1974). Moreover, assuming arguendo the veracity of Goldade's testimony, and as will be discussed infra, I have doubts as to it, that he continually assured Powell that he (Goldade) was not refusing to dispatch Fleck, such must be likened to ex-President Nixon's comment to John Dean in March 1973, after suggesting several methods of raising "hush" money for the imprisoned Watergate burglars, such would be wrong—that's for sure. The foregoing is not, as asserted, placing form over substance. Rather, it is drawing a conclusion, clearly supported by the record evidence. Therefore, by casting a baseless cloud over his availability for dispatch, Goldade, in effect, refused to dispatch Fleck to APM after a byname call for him and, thereby, violated<sup>19</sup> the exclusive hiring hall and dispatch procedures of the parties' collective-bargaining agreements. *Carpenters Local 1089 (E. F. Hargrett & Co.)*, 233 NLRB 275 (1977); *Plumbers Local 137 (Hames Construction)*, 207 NLRB 359, 366 (1973). Finally, in this regard, there is no dispute that Fleck was neither informed of his name call by Respondent, afforded the opportunity of accepting or rejecting same, nor dispatched to the Fort St. Vrain job.

The instant legal setting is one not uncommon in Board proceedings—a labor organization's operation of an exclusive hiring hall.<sup>20</sup> More specifically, the central issue herein involves a labor organization's obligation to honor contractually established exclusive hiring hall dispatch procedures, and, in this area, Board law is explicitly clear. Thus, any departure from the rules or procedures for the operation of an exclusive hiring hall, recited in or established by a collective-bargaining agreement, "which results in a denial of employment to an applicant . . . inherently . . . breaches the duty of fair representation owed to all hiring hall users, and violates Section 8(b)(1)(A) . . ." *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50 (1982); *New York Lithographers*, supra at 1047; *Plumbers Local 392 (Kaiser Engineers)*, 252 NLRB 417, 421 (1980). Contrary to the contention of Respondent's attorney, this is so notwithstanding the absence of specific discriminatory intent. *Operating Engineers Local 406*, supra. Herein, the record establishes that Respondent operates an exclusive hiring hall for the referral of employees to various employers, including APM; that the procedures for the operation of said hiring hall are set forth in, and established by, collective-bargaining agreements; that, pursuant thereto, workers are dispatched on an equal basis after either specific name calls or open calls for individuals on

the out-of-work list; that Fred Powell, on behalf of APM, submitted a specific request for Calvin Fleck; and that Jacob Goldade, in contravention of the aforesaid procedures, in effect, refused Powell's request, thereby denying to Fleck the opportunity for dispatch to APM. Moreover, although not specifically alleged as another violation of the Act, there is no evidence that any other user of Respondent's hiring hall was notified by Respondent of what amounted to a change in its hiring hall procedures. Thus, by taking it on himself to convince an employer to forego utilization of the contractually established call-by-name procedures, Goldade significantly altered the operational methodology of the hiring hall.<sup>21</sup> The failure to give notice of such a change of job applicants in order to keep them informed about matters critical to their employment status also constitutes a breach of Respondent's duty to fairly represent job applicants. *Id. Plumbers Local 392*, supra at 421.

Analysis of her posthearing brief discloses that Respondent's attorney postulates two main defenses to the instant unfair labor practice allegations. Pointing to Fleck's hand injury, which he suffered on October 10 and for which he was not released to work until November 16, she asserts that Fleck was, in fact, unavailable for dispatch to the Fort St. Vrain job and that, therefore, no refusal to refer was possible. Initially, said contention is directly analogous to a contention raised in similar cases—that no unlawful failure to refer may be found if no job actually existed to which the applicant could have been dispatched, and such a "factual" argument has traditionally been found to be lacking merit especially when other reasons are advanced for refusing to refer. *Utility & Industry Construction Co.*, 214 NLRB 1053 (1974); *Electrical Workers IBEW Local 648 (Foothill Electrical Corp.)*, 182 NLRB 66, 69 (1970). Herein, as he had no knowledge of Fleck's hand injury and while he offered several other unfounded excuses, Goldade did not raise an injury as an excuse why Fleck would refuse dispatch to Fort St. Vrain during his conversation with Powell. Moreover, I note that by failing to notify Fleck of the byname request for his services, Respondent effectively foreclosed any opportunity for him to seek and obtain an earlier work release which would have permitted Fleck to work at Fort St. Vrain for APM. I do not believe Respondent should be permitted to defend its actions herein based on the Charging Party's injury status as his actual availability for the APM job may well have been precluded by Respondent's own misconduct. *Plumbers Local 13 (Mechanical Contractors Assn. of Rochester)*, 226 NLRB 583 (1976).

Respondent's next defense concerns Goldade's motivation in convincing the reluctant Powell not to insist on Fleck but rather to take workers who were at the top of the out-of-work list. Counsel asserts that Goldade had a "legitimate purpose" in mind—he "sought to ensure that the Employer did not unreasonably abuse its contractual

<sup>19</sup> Both Sanford and Goldade conceded APM's contractual right to request individuals by name for dispatch, arguing that the company had been abusing this privilege, and the contractual hiring hall procedures establish such as a co-equal method of dispatch with open calls off the out-of-work list. Accordingly, inasmuch as I think Goldade was absolutely obligated to honor Powell's request for Fleck, I must conclude that Goldade's failure to do so was in contravention of the hiring hall procedures.

<sup>20</sup> A labor organization which has an exclusive hiring hall, such as herein involved, must represent individuals, who seek to utilize the hall, in a fair and impartial manner. *Boilermakers Local 169 (Riley Stoker Corp.)*, 209 NLRB 140, 144-145, 150 (1974). Moreover, job referrals must not be based on arbitrary, hostile, invidious, or capricious considerations. *New York Lithographers Union No. 1-P (Publishers Assn. of New York City)*, 258 NLRB 1043, 1046 (1981).

<sup>21</sup> While I of course recognize that what Goldade did was not a formal change in operating procedures for the hiring hall, his conduct, nevertheless, amounted to such as it could be utilized as precedent, in the future, for refusing to honor byname calls, thereby significantly affecting the dispatch rights of all registrants on the out-of-work list.

power by continuously utilizing the specific name call provision to the detriment of other millwrights duly registered on the out-of-work list" and that, therefore, no violation of the Act should be found. In *Operating Engineers Local 406*, supra, the Board noted that the failure to follow established exclusive hiring hall procedures constitutes a violation of the Act "unless the union demonstrates that its interference with employment . . . was necessary to the effective performance of its representative function." Id.; *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973). Put another way, "where a union acts 'in furtherance of a valid objective for the benefit of its membership as a whole,' it will not be found to have acted in violation of the Act." *New York Lithographers*, supra at 1047; *Marquette Cement Mfg. Co.*, 213 NLRB 182 fn. 2 (1974). While the record establishes that Sanford and Goldade met with APM representatives in August in order to discuss APM's practice of continually calling for workers by name and Goldade, denying any personal animus toward Fleck, testified that his only motivation in convincing Powell no longer to insist on Fleck was, "I was wanting him to use people closer to the top of the out-of-work list," I do not believe that Respondent has established that its violation of the contractual hiring and dispatch procedures, in any way, was designed or intended to benefit its membership as a whole. At the outset, while Respondent's difficulties with APM may have presented a problem to it in August, there is no record evidence to establish that said problem was of such a magnitude or significance to permit Respondent to act as it did in November. Thus, as Sanford admitted, at the same time he was meeting with APM representatives, "we were having one heck of a hard time filling any job because we came off of a two months strike and work blossomed," and this condition continued for the next 6 months. Moreover, apparently as a result of Respondent's protestations, as Powell testified, APM officials did undertake measures to alleviate the concerns of Sanford and Goldade by no longer calling for entire millwright crews by name and by limiting such requests to the individual who would be designated the crew foreman. Further, Sanford also admitted that, at the time APM was starting its Fort St. Vrain job, Respondent's problem with that company had been remedied. Finally, utterly undermining any contention that Respondent was unduly concerned in November about a paucity of open calls for workers off the out-of-work list, Sanford admitted that, if a member was at the head of said list, his chances for dispatch were "real good." As to Goldade's assertion that he was solely motivated by altruistic concerns while speaking to Powell on November 12, I credit Powell that Goldade never referred to the out-of-work list during their conversation and the record contains two blatant examples of less than candid testimony so as to cast severe doubt as to the veracity of Goldade's testimony. Thus, he and Kathy Rendon directly contradicted each other as to whether, in her note drafted immediately after speaking to Fred Powell on November 11, she wrote that the former had requested Fleck, by name, for the Fort St. Vrain job, with Goldade testifying, with certitude, that she did not. Next, I found absolutely incredible Goldade's account of his alleged

telephone conversation with Fleck in late October or early November, in which the latter supposedly refused a dispatch. In this regard, I specifically note the failure of Respondent's counsel to find any record of such a call—leading to the justifiable inference that it did not exist. In the foregoing circumstances, I reiterate that Respondent has failed to establish that its conduct was in the furtherance of a valid objective so as to insulate it from being found to have violated the Act.

Inasmuch as Respondent, through its agent Goldade, acted in disregard of its exclusive hiring hall procedures and caused APM to withdraw a specific request for Calvin Fleck, and, as a result, failed and refused to dispatch Fleck to APM's Fort St. Vrain job, I conclude that Respondent acted in violation of Section 8(b)(1)(A) of the Act. *Operating Engineers Local 406*, supra; *Carpenters Local 1089*, supra.

#### CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
2. APM is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
3. By causing APM to withdraw its byname request for Calvin Fleck, thereby failing to abide by the procedures of its exclusive hiring hall, and by, as a result, failing and refusing to dispatch Fleck to APM's Fort St. Vrain job, Respondent violated Section 8(b)(1)(A) of the Act.
4. By failing to timely and fully inform all users of a change in the operating procedures and rules of said hiring hall and referral system, Respondent acted in violation of Section 8(b)(1)(A) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Respondent engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act. Inasmuch as there is record evidence of a failure to dispatch Fleck to just the Fort St. Vrain job, I shall further recommend that Fleck be made whole for any loss of earnings and benefits which he may have suffered by reason of Respondent's unlawful refusal to refer him to that job. Backpay<sup>22</sup> shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1950).<sup>23</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

<sup>22</sup> As it appears that Fleck was to be the millwright crew foreman on the Fort St. Vrain job, backpay should be at the foreman's rate of pay.

<sup>23</sup> See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

ORDER<sup>24</sup>

The Respondent, Millwrights and Machinery Erectors, Local Union No. 2834, Denver, Colorado, its officers, agents, and representatives, shall

## 1. Cease and desist from

(a) Coercing or restraining employees, members, job applicants, or registrants by failing and refusing to dispatch them in violation of the rules and procedures of its exclusive hiring hall and referral system.

(b) Operating its exclusive hiring hall and referral system in an arbitrary manner and failing to timely and fully inform all users of changes in the operating procedures and rules of said hiring hall and referral system.

(c) In any like or related manner restraining or coercing employees, members, job applicants, or registrants in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Make Calvin Fleck whole for any wages and benefits he may have lost as a result of the failure to refer him to the Fort St. Vrain job in the manner set forth in the section entitled "Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all

<sup>24</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

hiring records, dispatcher lists, referral cards and other documents necessary to analyze and compute the amount of backpay due Fleck.

(c) Post at its business offices, hiring hall, and meeting places in Denver, Colorado, copies of the attached notice marked "Appendix."<sup>25</sup> Copies of the notice, on forms provided by the Regional Director for Region 27, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that notices are not altered, defaced, or covered by any other material.

(d) Additional copies of the attached notice marked "Appendix" shall be signed by an authorized representative of Respondent, and forthwith returned to the said Regional Director for posting by APM, if said employer is willing, at its jobsites in the States of Colorado and Wyoming where notices to employees and members of Respondent are customarily posted.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>25</sup> If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."